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Some years ago in his now famous Maccabaean Lecture, Lord Patrick Devlin pointedly raised the question of justifying society's enforcement of laws which are grounded in "doctrines in which citizens are entitled to disbelieve."[1] Lord Devlin concluded that while society cannot tolerate a legal system in which crime and sin (immorality) are totally separate and distinct, nevertheless it is *not* acceptable for society to justify punishment by relying on any type of *religious* authority which may attach to principles standing behind the law.

The long history of the relation between Western religion and secular law is both interesting and complex.[2] In what follows I shall discuss one current social issue which is illustrative of this relation, namely, the relatively recent legal-moral controversy over obscenity.[3]

It is undeniable, I feel, that in its most recent decisions the United States Supreme Court has failed to resolve adequately the question of obscenity. Such a resolution may, of course, be impossible, but it is certainly arguable that the Court simply has added to the confusion and debate surrounding the question.

On June 21, 1973, the Supreme Court handed down a series of decisions on obscenity the leading one of which is *Miller* v. *California*.[4] In the majority opinions of this series one detects a tone of relief. Most of the justices, and many outside the Court, had come to feel that the obscenity issue had become burdensome, consuming too much of the court's valuable time. Something relatively definitive had to be done. So what did the Court do in *Miller*?

Surely one of the most definitive steps taken by the Court had to do with the often-used appeal to *utility*. Not a few lawyers, social scientists, philosophers and civil libertarians have for some time been critical of legislation, judicial decisions and those "popular" opinions which seem to assume, if not explicitly assert, that there is an empirically detectable link between (1) exposure to allegedly obscene material and (2) anti-social

conduct and/or moral deterioration. Those who seriously doubt or deny any such detectable cause and effect relation point to such studies as the *Presidential Report of the Commission on Obscenity and Pornography* as indicating that there is no "hard" evidence to justify suppression of allegedly obscene material. These critics are utilitarian in the sense that they believe that until, and only until, the socially harmful effects of exposure to alleged obscenity can be seen as at least probable is suppressive legislation justified. Their shibboleth might be, "Where there is uncertainty, should not freedom prevail?"

Unfortunately for the utilitarians, the *Miller* majority was emphatic and explicit in its rejection of the appeal to utility. In Chief Justice Burger's (majority) view, it is not necessarily the case that where certainty is lacking freedom should prevail. The majority did *not* view its task as one of resolving "empirical uncertainties underlying state legislation" unless such legislation obviously violates constitutionally protected rights.[5] "Various unprovable assumptions" which form bases for existing state and federal legislation do not, of themselves, make such legislation constitutionally suspect or invalid.[6] Since obscenity is *not* protected by either the First Amendment or the Fourteenth Amendment,[7] and since states may legislate on the basis of unproved or unprovable assumptions which are adjudged reasonable conclusions not affecting basic rights,[8] the utilitarian will get nowhere with his insistence on empiricism, at least given the present composition of the Court.

Now one important consequence of this insensitivity to the empirical question on the part of the Burger majority is that it serves to keep the judicially acceptable obscenity debate confined to language and issues which underscore the religio-moral character of legislation. The language of such legislation reveals no concern with anti-social acts (*e.g.*, molestation, rape), a point well-made some years ago by Louis Henkin when he wrote:

> ". . . it seems clear . . . obscenity legislation has had other purposes and motivations. The accepted definition of obscenity, as that which 'appeal(s) to . . . prurient interest,' makes no assumption that it will incite to any action. The history of obscenity legislation points, rather, to origins in aspirations to holiness and propriety. Laws against obscenity have appeared conjoined and cognate to laws against sacrilege and blasphemy, suggesting concern for the spiritual welfare of the person exposed to it and for the moral well-being of the community."[9]

The "basic guidelines for the trier of fact"[10] laid down by the *Miller* majority continue this tradition of language lacking any specific reference to, or obvious concern about, anti-social *acts*. The first guideline simply speaks of the appeal to prurient interest, and the "average person, applying contemporary community standards"; the second refers to "sexual conduct" and its depiction or description in a "patently offensive way" vis-a-vis state law; and the third is basically a rejection of the view that a work must be *utterly* lacking in redeeming social value before it may be considered legally obscene.[11]

In *Miller* the Court's majority undertook to (1) "formulate standards more concrete than those in the past";[12] (2) to reject as necessary the application of "fixed, uniform national standards" of obscenity;[13] (3) to provide a few examples of state statutory language which would be acceptable under the guidelines of

Miller;[14] and (4) to permit the trier of fact to *construe* existing legislation in ways compatible with these guidelines.[15] The general intent behind these guidelines was to isolate "hard core" obscenity, and *local* communities were to be given more freedom in making this determination.[16] All of this was to be accomplished in a constitutionally legitimate way, for Chief Justice Burger wrote that if the states attended to the limitations of the new guidelines, "First Amendment values applicable to the states" would be "adequately protected by the ultimate power of the appellate courts to conduct an independent review of constitutional claims when necessary."[17]

The decision in *Miller* was widely hailed by anti-obscenity forces and viewed with great alarm by civil libertarians and others. The former quite reasonably saw it as providing not just more power for the local communities over the control of alleged obscenity, but also a broader set of guidelines for doing so, together with considerable power in the trier of fact's right to construe existing legislation in a way consistent with the newly announced standards.[18] Legal assaults were made on *Playboy* magazine (Virginia) and on "Clockwork Orange" (Colorado). In general, *Miller* seemed to provide fresh and very fertile ground for the growth of anti-obscenity initiatives.

Just recently, however, the apparently fairly clear issue of determining the legally obscene has become very cloudy once again, due primarily to the case of *Jenkins* v. *Georgia.*[19] In reversing the Georgia Supreme Court's ruling that the film "Carnal Knowledge" is obscene, a majority of the U.S. Supreme Court appears to take away from the local community the freedom to determine obscenity seemingly given in *Miller.* The Court's majority held that the Supreme Court of Georgia was mistaken in its "apparent conclusion that the jury's verdict . . . virtually precluded all further appellate review . . . ."[20] Yet the letter and spirit of *Miller* and its companion cases makes Georgia's conclusion a perfectly reasonable one.[21]

Writing for the majority in *Jenkins,* Justice Rehnquist acknowledges that *Miller* permits "juries to rely on the understanding of the community from which they "come" as to contemporary community standards."[22] He also reiterates the earlier holdings that "expert testimony as to obscenity is not necessary when the films at issue are themselves placed in evidence," and that appeals to prurient interest and patent offensiveness are "essentially questions of fact."[23] Nevertheless, Justice Rehnquist says that it would be a "serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.' "[24]

But why this rebuff, given *Miller?* The answer to this question seems hardly satisfactory. It is that the Court itself, after viewing "Carnal Knowledge," decided that it did not fall "within either of the two examples given in *Miller* of material which may constitutionally be found to meet the 'patently offensive' element of those standards. . . ."[25] This is the argument given, and given even in face of the admission that the examples offered in *Miller* were *not* meant "to be an exhaustive catalogue of what juries might find patently offensive. . . ."[26] It is no wonder that Justice Brennan's remark in *Paris* v. *Slaton* now seems prophetic: ". . . . . the careful efforts of state and lower federal courts to apply the standard [of *Miller*] will remain an essentially pointless exercise, in view of the need for an ultimate decision by this court."[27]

Now what happened between *Miller* and *Jenkins*? I suggest that the anti-obscenity forces quite reasonably interpreted *Miller* to mean that the Supreme Court wished to rid itself of case-by-case determination of obscenity. The method chosen was one of broadening the guidelines for determining obscenity and allowing considerable discretion to local triers of fact. The Court obviously hoped that though *Miller* provided greater power to the local communities, this power would be exercised merely to separate the "hard core" material from that having some kind of merit artistic, scientific, etc.). As the case of "Carnal Knowledge" made clear, things did not develop in that way. A film of nationally recognized artistic merit, quite different in many ways from those films ordinarily shown in the "X-rated" theaters, was judged obscene by a local community and, relying on *Miller,* the appellate system of an entire state upheld this judgment. As the cries of anguish over such a turn of events increased to screams, the Court had to find a way of controlling its own creation. *Jenkins* was intended to do just this, but its cost would appear to be, first, a return to the Court's own case-by-case determinations, and second, the not wholly unjustified feeling on the part of many local communities that the Court had given and the Court has now taken away.

Justice Harlan once referred to "The intractable obscenity problem." Why should the issue of obscenity be such? I suggest that at least part of the answer is that the continuing debate over obscenity must be understood in terms of the origins of obscenity legislation, origins which have to a large extent become a legacy for contemporary society. Briefly contrasting the issue of obscenity with that of abortion may help to illustrate this point.

It is widely held that laws against abortion had their origin in a concern for the life or physical well-being of the pregnant female. Most Western criminal laws against abortion first appeared in the middle 1800's when abortion was still a dangerous medical procedure.[28] But due to advances in medical technology this is no longer generally true. Thus the widely accepted *origin* of abortion laws cannot now be used to *justify* either the retention or reinstitution of these laws. And in fact the anti-abortion movement does not attempt to justify its position in this way, but rather concentrates on the philosophico-metaphysical claim that the human foetus is a *person.* For the typical anti-abortionist the history of abortion laws plays no significant role in the stance against abortion.

It is hardly obvious, however, that what has just been said about abortion can also be said about the debate surrounding obscenity. With respect to this issue, the language of origin all too often continues to be the language of justification. Taking the case of *Queen* v. *Hicklin*[29] as a convenient beginning, we note that Lord Chief Justice Cockburn tried to define obscenity in terms of "the tendency" of matter to "deprave and corrupt" minds open to "immoral influences."[30] Though "deprave and corrupt" was not defined, the Chief Justice though it had something to do with suggesting "thoughts of a most impure and libidinous character."[31] The *Hicklin* language passed into American law when Judge Blatchford ruled that it was the suggestion of "impure thoughts and libidinous thoughts" which depraved and corrupted.[32] Why, in the absence of some reference to anti-social *acts,* the law should concern itself with "impure and libidinous thoughts" was never made clear, but it is likely that behind such a decision was the belief, possibly more tenable then, that a *public* (*i.e.,* commonly accepted) sexual morality existed, and that it was one of the functions of the law to protect this morality.

While various courts attempted to reformulate and refine the standard(s) for obscenity,[33] it is noteworthy that as late as 1933 the "libidinous effect" feature of *Hicklin* still stood as the test for obscenity.[34] In 1948 it was urged by the Doubleday firm's counsel that the courts adopt a "clear and present danger" test for suppression, but the Supreme Court divided four-to-four.[35] Such a test was again urged on the Court in *Roth* in 1956,[36] but was rejected because it was held that obscenity was not entitled to any First Amendment protection at all. When we finally reach *Miller* we see that it embodies the definition of 'obscenity' found in *Roth,* namely, that of the average person who, by applying contemporary standards, decides that the dominant theme of the work taken as a whole appeals to "prurient interests." This is an improvement over *Hicklin* and other decisions in some respects,[37] but in at least two other respects it is not.

First, *Hicklin* spoke of thoughts of a "most impure and libidinous character." *Miller* talks about the appeal to "prurient interests." When we turn to the most modern dictionary we find that 'prurient' is defined in terms of 'lasciviousness', and the latter in terms of 'lewd or lustful.' While ultimately this may not be to define 'obscenity' in terms of itself, as some have suggested,[38] it certainly does cause one to wonder whether the language of *Miller* is essentially different from that of *Hicklin.* Additionally, in Justice Cockburn's notion of "the tendency" of material to "deprave and corrupt" there is at least a hint that some causal connection between obscenity and behavior was in mind and considered relevant. But *Roth* rejected any "clear and present danger" test, and, as we have seen, *Miller* simply refuses to consider any empirical considerations of a cause and effect nature.

We have now reached a point where a general, but little asked, question should arise, namely, "What is wrong about appealing to prurient interests?" Given *Miller,* the answer cannot be that such appeals lead to anti-social *acts,* for the Court is willing to concede that no one knows whether this is true. No doubt there are many people who believe that alleged obscenity generally does lead to anti-social behavior, but this mere belief can hardly morally justify a decision like *Miller,* especially when the majority of scientific opinion is either neutral or in disagreement with such a belief.[39] The fact that in general obscenity legislation and legal guidelines reveal little or no concern with anti-social *acts* shows, I think, that the wrongness of appealing to prurient interests is thought to lie elsewhere. Let me illustrate by quoting from a recent work, one of whose major purposes is to develop a rationale for some type of censorship. Harry M. Clor writes:

> ". . . study of the effects of obscenity leads to two sets of conclusions. With regard to the direct effects of salacious literature upon conduct, *informed opinion is divided and the evidence is problematic.* The evidence does not preclude a reasoned judgment that obscenity is sometimes a factor in the promotion of antisocial behavior. But the social importance or magnitude of such direct effects as can be shown remains open to dispute. *The most socially significant issues concern the more subtle and long-term influences of obscenity upon mind and character—its moral effects. Obscenity can contribute to the debasement of moral standards and ultimately of character.*"[40]

The above remarks are representative of a kind of move in debate frequently made by the anti-obscenity forces. Realizing the lack of "hard" scientific data

to support a claim about the occurrence of anti-social *acts,* the shift is to an argument which seems a combination of a rather vague causal claim ("Obscenity can contribute . . .") and value judgments ("debasement of moral standards").

It is true, of course, that someone's moral character and/or standards may very well *change* when exposed to any number of different influences, including alleged obscenity. That is, someone may come to believe that some type of act is no longer morally wrong and begin acting and feeling consistently with this belief. Since alleged obscenity is the context of discussion, let us suppose that a husband and wife, both of whom believe that certain sexual acts are "unnatural" and therefore immoral, happen to see the movie "He and She."[41] Now let us further suppose that following this experience the couple begins to engage in the wide range of sexual activity explicitly depicted, and even encouraged, in this movie, and after a period of time finds that a richer, more mutually satisfying sex life is the result. As a consequence, this wide range of sexual activity becomes routine for the couple when in private.

Now if such a significant change in moral attitude and behavior were to take place in the life of such a couple, on what basis could one justify the claim that the husband and wife had become *debased?* Can debasement be distinguished from change? Well, suppose that the husband and wife began engaging in a wide range of sexual activity in public, began to practice on their children, and in general became so caught up in their new sexual routine that this behavior came to completely dominate their lives to the exclusion of all other pursuits. Here, I think, most people would say that this couple had not merely changed, but had become debased. However, there are several points to notice about such a claim. First, the judgment of debasement could not be made apart from some standards of value with which the new behavior of the couple was compared. Second, not a few of those condemning the couple would surely do so purely on the basis of the *social* consequences of the new behavior (the effects on the children, the lack of attention to social obligations, etc.). And finally, the new behavior of the couple would hardly seem to be an example of those "more subtle" influences of alleged obscenity which people like Clor believe to involve the "most socially significant issues."

In developing my original example in such an extreme way I have attempted to present a case in which the transition from moral change to debasement would be generally recognized. However, as these extreme developments are eliminated and we return to simply the husband and wife in their privacy, the consensus concerning *debasement* will surely fade. It will fade precisely because it will include many individuals who believe that sexual behavior of the type(s) which the husband and wife now find morally acceptable is not *per se* immoral. The *remaining* agreement concerning debasement will represent a type of moral judgment certainly consistent with the language of *Miller,* at least to the extent that such agreement will rest on the belief that certain types of sexual conduct are in themselves wrong, regardless of their *tangible* social consequences, and, as we have already seen, *Miller* rejects any utilitarian arguments in attempting to legally fix the obscene.

The guidelines of *Miller,* however viewed by the Court, continue the long tradition of legally sanctioning a type of religious sentiment. The key, of course, is the "prurient interest" test. That certain feelings, thoughts and/or desires

are in themselves wrong, and thus to be discouraged, is a belief firmly embedded in traditional Judaeo-Christianity. The description of depiction of sexual conduct which allegedly has a prurient appeal must necessarily be "patently offensive" (*Miller*'s second guideline) to anyone within this tradition, and it is certainly difficult to see how such a person could view a patently offensive work as having any "serious literary, artistic, political or scientific value" (third guideline).

But should the thoughtful religious person of democratic persuasion rest content with such a situation? Should he, that is, rest comfortably in the knowledge that his own religio-moral feelings are institutionalized in decisions such as *Miller?* He should not, and in fact does not, for he experiences an intellectual disquiet when charged with supporting attempts to institutionalize his own view of sexual morality. He perceives that the question from Lord Devlin with which we began must be adequately met if the spectre of punishing heresy is to be avoided. His evasive move consists in making general and vague claims which are *hybrids* of causal and moral language; for example, that exposure to obscenity will produce subtly debasing effects on moral character. This position has some strength, for if only implicitly it makes reference to the important fact that society must have *some* concern with the individual's moral character. No society can afford to totally ignore the question of what type(s) of individuals are being formed within it. And also, by presenting the obscenity issue as a "causal" one, the religious person is acknowledging that in a modern democratic society legal or quasi-legal sanctions ought to be tied to actual or probable harm of some type(s). By combining the language of cause and effect with moral notions, and by relying on the accepted need for some degree of societal concern with morality, the religious person can appear to justify his position *independently* of purely religious considerations. This is an act of legerdemain, but unfortunately the *Miller* majority refuses to recognize it as such.

As noted earlier, in formulating its guidelines the Court's majority refused to consider the possible existence of "unprovable assumptions" and "empirical uncertainties underlying state legislation" in the area of obscenity. But this hands-off approach seriously oversimplifies the issues, for it makes it seem as if these state restrictions rested on assumptions of a straightforwardly empirical, cause and effect character (*e.g.,* exposure to certain material causes rape). It is very doubtful, however, that this type of assumption has *ever* been the real basis of such state legislation. It would be much more accurate historically to say that even when the concern to suppress the allegedly obscene has not been blatantly religious, it has still rested on those hybrid assumptions whose moral content has been drawn from the Judaeo-Christian tradition. By adopting a hands-off policy vis-a-vis state legislation, the majority opinion in *Miller* helps to obscure this important fact, and in so doing discourages open discussion of questions concerning tangible harm, change and debasement, and other related matters. To openly confront these questions would force us to reconsider a fundamental issue, namely, the relation between obscenity and the First Amendment.

FOOTNOTES

[1]*The Enforcement of Morals* (Oxford University Press, 1968), p. 7.

[2]For an informative and thoughtful consideration of this question the reader might consult Harold J. Berman's *The Interaction of Law and Religion* (Nashville, 1974).

[3]The first precedents on obscenity did not emerge from the U.S. Supreme Court until 1957 in *Roth* v. *United States,* 354 U.S. 476 and the companion case *Alberts.*

[4]413 U.S. 15 (1973).

[5]*Paris Adult Theater I* v. *Slaton,* 413 U.S. 49, 60 (1973).

[6]In a companion case to *Miller* the majority wrote: "The fact that a . directive reflects unprovable assumptions about what is good for the people is not a sufficient reason to find that statute unconstitutional." *Paris* v. *Slaton.*

[7]413 U.S. 49, 54 (1973).

[8]*Kaplan* v. *California,* 413 U.S. 115, 120 (1973).

[9]63 *Columbia Law Review* 393-394 (1963).

[10]413 U.S. 15, 24 (1973).

[11]413 U.S. 15, 24 (1973).

[12]413 U.S. 15, 20 (1973).

[13]413 U.S. 15, 30 (1973).

[14]413 U.S. 15, 25 (1973).

[15]413 U.S. 15, 30 (1973).

[16]413 U.S. 15, 29 (1973).

[17]413 U.S. 15, 25 (1973).

[18]It is interesting to note that on remand the general tendency among the lower courts has been to view *Miller* as less exacting on the states that earlier guidelines. *Watkins* v. *South Carolina* (SC Sup. Ct., 14 crL 2324) is a fairly typical example of this. The U.S. Supreme Court dismissed an appeal from this decision of July 25, 1974. Also, on the same day the Court denied review of a remanded California case in which it was held that one of the requirements of *Miller* can be satisfied by judicial construction of a statute that speaks simply of "obscenity". *Peachtree News Company Inc.* v. *United States* 484 F.2d 1149 (5th Cir. 1974).

[19]199 S.E.2d 183.

[20]418 U.S. 153, 160 (1974).

[21]In fact, this was essentially the overall view taken by Georgia's legal defense team in argument before the Court.

[22]418 U.S. 153, 157 (1974).

[23]418 U.S. 153, 159 (1974).

[24]418 U.S. 153, 160 (1974).

[25]That is, the Court decided that the film did not include "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" or "representations or descriptions of masturbation, execretory functions, and lewd exhibition of the genitals." 413 U.S. 15, 25 (1973).

[26]418 U.S. 153, 160 (1974).

[27]413 U.S. 49, 100 (1973).

[28]For a brief, but informative, discussion of this historical question one can consult the U.S. Supreme Court's decision in *Roe et al* v. *Wade,* 410 U.S. 113 (1973).

[29]L.R. 3 Q.B. 360 (1868). For a detailed discussion of the history sketched in this and the following paragraph one can see Harry M. Clor's *Obscenity and Public Morality* (Chicago, 1969), Chapter I.

[30]*Ibid.,* 371.

[31]*Ibid.*

[32]16 Blatchford 338 (N.Y. S.D. 1879) at 355.

[33]For example, the "dominant theme" consideration first appeared in *United States* v. *Dennett,* 39 F.2nd 564 (2nd Cir. 1930).

[34]*United States* v. *One Book Called "Ulysses",* 5 F. Supp. 182 (S.D. N.Y. 1933).

[35]*Doubleday and Company* v. *New York,* 335 U.S 848 (1948).

[36]354 U.S. 476 (1956).

[37]For example, we are now supposed to concern ourselves with the "average" person's reactions, and we are not permitted to concentrate on isolated passages or parts of a work.

[38]*Cf.* Henry Kalven's "Metaphysics of the Law of Obscenity" in *The Supreme Court and the Constitution,* ed. by Philip B. Kurland, (Chicago, 1960), p. 15.

[39]*Cf. Presidential Report of the Commission of Obscenity and Pornography.*

[40]*Ibid.,* pp. 174-175; my emphases. Concerning the "problematic" character of the evidence, it should be noted that Clor's book appeared *before* the Presidential Commission's report.

[41]This movie has been the subject of litigation and has been held obscene in some jurisdictions. Undoubtedly the U.S. Supreme Court would consider this movie "hard core" material. Also, the claim that no husband and wife, believing as mine do, would go to see such a movie in the first place is probably correct. But if so, it raises a serious question about. the tendency of such movies to deprave or corrupt the large audiences they attract. I chose the example as a basis for discussion of change and debasement.